(25,353)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 523.

BETHLEHEM STEEL COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print
Petition and amended petition	1	1
Exhibit A—Contract between Bethlehem Steel Co. and the United States, September 27, 1909	11	7
B—Letter, Winthrop, assistant secretary, to Jackson, February 7, 1912	22	13
Record of proceedings of board, &c.	23	13
C—Letter, Winthrop, assistant secretary, to Jackson, May 15, 1912	28	16
Report of board, &c.	28	17
Opinion, Winthrop, assistant secretary	32	19
Traverse	36	21
History of proceedings	37	21
Findings of fact, conclusion of law, and opinion of the court	38	21
Judgment of the court	45	28
Claimant's application for and allowance of appeal	46	28
Certificate of clerk	47	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1916.

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Court of Claims.

No. 32892.

BETHLEHEM STEEL COMPANY

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

On August 14, 1914, the claimant filed its original petition. Subsequently, to wit, on October 29, 1914, by leave of Court, an amended petition was filed which is as follows:

To the Honorable the Chief Justice and Judges of the Court of Claims the claimant respectfully shows:

1. On September 27, 1909, the claimant, a corporation organized and existing under the laws of the State of Pennsylvania, of the one part, and the United States, represented by the Secretary of the Navy, of the other part, made and entered into a contract in writing, which theretofore had been prepared by the Navy Department. A
2 copy of the same is hereunto annexed, marked Exhibit "A," and made part of this petition.

By the said contract, it was, among other things, provided:

Claimant covenanted and agreed to manufacture for and deliver to the Navy Department certain steel armor plates of Classes A, B, C, D and E, a list of which was contained in Paragraph First of the contract, the same being part of the armor plates required for use in the construction of battleships Nos. 32 and 33, or such other battleships as might be designated by the Navy Department. It was stipulated that the said armor plate should be manufactured in conformity with the requirements of a paper theretofore published by the Navy Department, entitled "Circular and Specifications of the Navy Department, concerning Armor Plate and Appurtenances for vessels of the United States Navy," and which was annexed to and made part of the said contract (Paragraph First).

The United States covenanted and agreed to furnish to the claimant, from time to time, schedules showing the manner in which the said armor plates should be classified, together with their shapes and dimensions, and assigning the order in and the dates on which deliveries of the same would be required by the Navy Department. It was stipulated that within a period of six months after the receipt of the first of the said schedules with preliminary drawings sufficient to enable the claimant to forge and rough shape the armor plates, the claimant would begin making deliveries thereof and thereafter would continue to make deliveries of the same at a rate of not less than 400 tons a month, provided that the Navy Department should have fur-

nished to the claimant the final detailed drawings of each of the lots of armor not less than four months prior to the date set for its delivery (Paragraph Third).

It was further covenanted and agreed that changes in the
3 conditions or requirements of the said Circular and Specifications might be made by and with the mutual consent of the parties to the contract, and that if any changes were thus made the actual cost thereof and the damage, if any caused thereby, and the amount by which the claimant's compensation should be increased or diminished if at all in consequence of such changes, should be ascertained, estimated and determined by a board of naval officers, to be appointed for the purpose by the Secretary of the Navy, the determination of such board, or a majority thereof, being made binding upon the claimant subject to a right of appeal to the Secretary of the Navy (Paragraph Seventh).

It was further covenanted and agreed that the claimant should give bond with sureties satisfactory to the Secretary of the Navy, conditioned for the faithful performance of the work embraced in the said contract and it was stipulated that the amount of the said bond should be equal to ten per centum of the total cost of the armor plates, enumerated in Paragraph First, provided, however, that at the end of each calendar year, the amount of the said bond should be reduced, so that the amount thereof, remaining outstanding, would represent ten per centum of the estimated cost of armor plate, then remaining undelivered (Paragraph Fifteenth).

By the said Circular and Specifications, it was required, among other things, that any armor plates furnished by the claimant, which, after their delivery, might develop defects sufficiently serious to cause their rejection, or which might show cracks, due to faulty manufacture, within periods of six months after the same should have been fastened on the ship to which they might be assigned, would be replaced by the claimant without delay (Sec. 75).

2. In accordance with the requirement of Paragraph Fifteenth of the said contract, the claimant on September 28, 1909, fur-
4 nished a bond with surety satisfactory to the Secretary of the Navy, in a penal sum of $195,000.00 conditioned for the faithful performance of the work embraced in the said contract. The said bond was accepted by the Secretary of the Navy.

The surety upon said bond, being a corporation, duly authorized to act in that capacity and regularly engaged in the business of suretyship, charged the claimant for its service in connection with the said bond, premiums at the rate of $4,899.10 per annum, during and throughout the period for which the bond remained in force, as hereinafter related, and the same were duly paid by the claimant.

3. In the performance of the said contract on its part the claimant, in due course, commenced and proceeded with the manufacture of the armor plates, enumerated in Paragraph First of the said contract. On or about November 30, 1910, while the manufacture of the said armor plates was in progress, the parties to the contract, by mutual agreement made in the manner provided in Paragraph Seventh, stipulated that in addition to the armor plates specified in

Paragraph First, the claimant would manufacture and deliver to the Navy Department, certain armor plates which would be required for use in the construction of the fire control tower of battleship No. 33 (U. S. S. Arkansas), it being understood and agreed that the requirement of such additional armor plates would be considered and treated as a change in the conditions and requirements of the Circular and Specifications, and that the cost of effecting the change and the damages, if any, caused thereby, and the increase or decrease of the compensation payable to the claimant on account thereof, should be ascertained and determined, in the manner provided by Paragraph Seventh.

In and about the manufacture and delivery of the said additional armor plates the claimant incurred cost and expense for the materials, labor, and other services used and employed therein; and furthermore, by reason of the manufacture of the said additional plates, the manufacture and delivery of the armor plates enumerated in Paragraph First of the contract was delayed and the cost of the same was increased over and above the cost that the claimant would have incurred on that account if the said change had not been made.

4. On or before March 7, 1911, the claimant manufactured and delivered to the Navy Department all of the armor plates enumerated in Paragraph First of the contract, and none of the same remained undelivered, but upon said date and thereafter until November 22, 1912, and subsequent thereto, certain armor plates remained to be furnished by the claimant for the purpose of: (1) replacing some of those enumerated in Paragraph First of the contract, which had been delivered by the claimant to the Navy Department, but subsequently rejected in consequence of defects, that developed after delivery; and (2) replacing some of the additional plates, which had been delivered by the claimant to the Navy Department for use in the construction of the fire control tower of said battelship No. 33 (U. S. S. Arkansas) but subsequently rejected in consequence of the defects that developed after delivery.

The claimant is advised and therefore shows that upon and by virtue of the delivery to the Navy Department of all of the armor plates enumerated in Paragraph First of the contract on or before March 7, 1911, it then became the duty of the Navy Department to cancel or otherwise terminate the bond which the claimant had given to the Secretary of the Navy on September 28, 1909, as aforesaid.

5. On or about January 27, 1912, the said bond still remaining uncancelled and in force, the claimant applied to the Secretary of the Navy to order its cancellation or terminate the same. But the Secretary failed so to do and on March 9, 1912, refused to allow the same to be cancelled or terminated and required that the claimant maintain it in full force and effect pending final acceptance of all of the armor plates that the claimant had agreed to furnish, namely: (1) the armor plates enumerated in Paragraph First of the contract; (2) the additional armor plates required for use in the construction of the fire control tower of the U. S. S. Arkansas; also (3) any and all armor which had been or might be furnished

by the claimant as provided by Art. 75 of the said Circular and Specifications, to replace those that had been or might be rejected in consequence of defects developing therein after delivery. The Secretary offered, however, to order the cancellation or termination of the said bond; provided that the claimant would furnish, in lieu thereof, a new bond with satisfactory surety in an amount satisfactory to the Bureau of Ordnance conditioned for the furnishing of certain armor plates to replace those that had been or might be rejected as aforesaid, including some of those that had been delivered by the claimant for use in the construction of the fire control tower of the U. S. S. Arkansas.

On February 26, 1912, the claimant furnished to the United States a bond bearing date December 27, 1911, with surety satisfactory to the Secretary of the Navy in a penal sum satisfactory to the Bureau of Ordnance, to wit: $3,500, conditioned for the replacing of any armor plates which having been furnished for use in the construction of the fire control tower of the U. S. S. Arkansas, had, subsequently, been, or might be, rejected, in consequence of defects developing after the delivery thereof. The said bond was accepted by the Secretary of the Navy. Thereupon the claimant, again requested the Secretary
7 of the Navy to cancel or terminate the bond which it had furnished on September 28, 1909, as aforesaid; but the said Secretary failed to do so, and on April 21, 1912, refused to order the cancellation or termination of the said bond, except and unless the claimant would furnish, in lieu thereof, a third bond with satisfactory surety, in the penal sum of $30,000, conditioned for the performance by the claimant of the work embraced in the said contract. On or about April 29, 1912, the claimant consented to furnish a third bond in conformity with this requirement, protesting nevertheless, that the requirement was in addition to the requirements that the claimant had assumed, and that the failure and refusal of the said Secretary to cancel or terminate the said bond which the claimant had furnished on September 28, 1909, as aforesaid, was contrary to the terms of the said contract (Paragraph Fifteenth). On May 8, 1912, the claimant furnished to the Secretary of the Navy a third bond, with surety satisfactory to him, in the penal sum of $30,000, conditioned for the performance by the claimant of the work embraced in the said contract, and the same was accepted by the said Secretary on May 15, 1912.

Thereupon the claimant for the third time requested the Secretary of the Navy to order the cancellation or terminate the bond which it had furnished on September 28, 1909, as aforesaid. But the Secretary failed and neglected to order or sanction the cancellation or termination of the same until May 25, 1912.

The claimant is advised and shows that under the terms of the said contract (Paragraph Fifteenth) the reduction and termination of the bond which it had furnished on September 28, 1909, as aforesaid, was not made dependent upon any condition, save the delivery to the Navy Department of the armor plates enumerated

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in Paragraph First of the contract, and that the said several failures and refusals of the Secretary of the Navy to cancel or terminate the same on and after March 7, 1911, were contrary to and in violation of the said contract and of the obligation which the said Secretary thereby assumed and undertook to perform. The claimant is further advised and shows that the continuance of the said bond given on September 28, 1909, and the furnishing of the additional bonds, all of which things were required by the said Secretary, as aforesaid, constituted changes of the terms and conditions of the said contract within the meaning of Paragraph Seventh thereof; that for its work and services in effecting the said changes, the claimant became entitled to receive as increased compensation, among other things, a sum equal to the premiums which it paid to its surety for the renewal or extension of its said bond, subsequent to March 7, 1911.

6. On February 7, 1912, the Secretary of the Navy, in part performance of the covenant contained in Paragraph Seventh of the said contract, on his part to be performed, appointed a board of naval officers for the purpose of determining the compensation that should be paid to the claimant on account of furnishing, as a change under the said contract, the additional armor plates, designed for the fire control tower of the U. S. S. Arkansas. On or about February 8, 1912, the said board ascertained and determined that the weight of the said additional armor plates was 58.51 tons, and that the claimant should be paid for the same the sum of $31,706.92. The said board did not consider, nor was it directed or authorized by the Secretary of the Navy to consider, any element of the cost of the said change, except the compensation payable for the additional armor plates. The increased compensation, which the said board found to be payable to the claimant, as aforesaid, did not include and did not purport to include any other items of increased cost or damage, caused by the said change, to which the claimant was thereby put in the performance of the said contract.

The above finding and determination of the said bond was duly reported to the Secretary of the Navy. On February 14, 1912, the Chief of the Bureau of Ordnance, Navy Department, recommended to the said Secretary that the said report of the said board be approved, and recommended further that the claimant be reimbursed for the expense which it had incurred for the renewal of the bond which it had given on September 28, 1909, as aforesaid. On February 20, 1912, the Secretary approved the said report, but declined to adopt the recommendation of the Chief of the Bureau of Ordinance with respect to the reimbursement of the claimant for the cost of the renewal of the said bond, ruling as a matter of law, that such cost was not an increase of cost, caused by the said changes, within the meaning of the contract (Paragraph Seventh).

Hereunto annexed, marked Exhibit "B" and made part of this petition is a copy of the official record of the Navy Department with respect to the appointment and proceedings of the said board and the action taken thereon by the Secretary of the Navy.

7. On May 15, 1912, the Secretary of the Navy in further per-

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formance of the covenant contained in Paragraph Seventh of the contract, on his part to be performed, appointed a board of naval officers for the purpose of determining the amount of increased or diminished compensation payable to the claimant under its said contract. In obedience to the said order the said board on May 17, 1912, "ascertained and determined the increased compensation payable to the claimant under its contract of September 27, 1909, for furnishing armor" and thereupon found and reported to the said Secretary that the claimant was entitled "to the sum of $5,772.19 as additional compensation for expense incurred in renewing bond for armor under contract of September 27, 1909." On
10 June 18, 1912, the Secretary of the Navy disapproved the said finding and report, ruling that as a matter of law the sum paid by the claimant for the renewal of its said bond was not an increased cost caused by change, within the meaning of the contract (Paragraph Seventh).

8. The claimant is advised and shows that the failure and refusal of the Secretary of the Navy to approve the finding and report of the board, last aforesaid, was due to error of law committed by him, and that, under the terms of the said contract, it became and is entitled to receive the said sum of $5,772.19, as increased compensation, to reimburse it for money expended to defray the actual cost of the said changes and damages caused thereby.

9. The claimant is the only person owning or interested in the claim above set forth, and no assignment or transfer of the same or any part thereof or interest therein has been made. The claimant is justly entitled to recover and receive from the United States the sum of $5,772.19. The claimant has made demand upon the United States for payment of the said sum, but the same has not been paid nor any part thereof.

The claimant has always borne true allegiance to the United States, and has not in any way aided, abetted or given encouragement to rebellion against it.

Wherefore the claimant prays for judgment against the United States in the sum of five thousand seven hundred and seventy-two dollars and nineteen cents ($5,772.19) and for such other and further relief as this Honorable Court may grant, both at law and in equity in the premises.

BETHLEHEM STEEL COMPANY,
By JNO. D. HAGENBUCH,
[SEAL.] *Ass't to President.*

JAMES H. HAYDEN,
Attorney for Claimant.

11 STATE OF PENNSYLVANIA,
County of Northampton, ss:

Jno. D. Hagenbuch being duly sworn, deposes and says that he is Assistant to President of the Bethlehem Steel Company, the claim-

ant named in and which subscribed the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 26th day of October, 1914.

[SEAL.] F. E. SIEGFELDT,
Notary Public.

My commission expires at end of next session of Senate.

EXHIBIT A.

Contract for Steel Armor Plates and Appurtenances, Battleship Nos. 32, 33, or Such Other Ships as May be Selected.

This contract of two parts, made and concluded this 27th day of Sept., 1909, by and between The Bethlehem Steel Company, a corporation organized under the laws of the State of Pennsylvania, and doing business at South Bethlehem, in the State of Pennsylvania, represented by A. Johnson, the 1st Vice-President of said company, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part:

Witnesseth, That for and in consideration of the payments hereinafter specified, the party of the first part, for itself and its successors and assigns, and its legal representatives, does hereby covenant and agree to and with the United States as follows—that is to say:

First. The party of the first part will, at its own risk and expense, manufacture and deliver to the Navy Department, in the manner prescribed and in accordance with the conditions stated in the "Circular and Specifications of the Navy Department concerning Armor Plate and Appurtenances for Vessels of the United States Navy," approved by the Secretary of the Navy June 19, 1909, which is hereto annexed and which shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated, herein, the steel armor plate and appurtenances therein described or referred to and herein designated, at the prices per ton hereinafter specified for the different classes and quantities of armor namely:

(*a*) Three thousand eight hundred and twenty tons, more or less, of Class A armor, consisting of plates of more than 5 inches in thickness, of the best and most resisting quality for armor of this class; to be manufactured by the most improved method by a process satisfactory to and approved by the Department, at the rate of $420 a ton of 2,240 pounds of finished and accepted plates.

(*b*) Four hundred and fifty-five tons, more or less, of Class B armor, consisting of plates of and less than 5 inches in thickness, of the best and most resisting quality for armor of this class, to be manufactured by the most improved method by a process satisfactory to and approved by the Department at the rate of $415.00 a ton of 2,240 pounds of finished and accepted plates.

13 (*c*) One hundred and twenty-three tons, more or less, of Class C armor, consisting of thin plates; to be manufactured by a process satisfactory to the Department, at the rate of $460.00 a ton 2,240 pounds of finished and accepted plates or shapes.

(*d*) One hundred and thirty tons, more or less, of Class D armor, consisting of hollow forgings, to be manufactured by a process satisfactory to the Department; to be tempered and annealed, but not face-hardened, at the rate of $587.00 a ton of 2,240 pounds of finished and accepted shapes.

(*e*) Sixty-six tons, more or less, of Class E armor appurtenances, bolts and nuts; to be manufactured by a process satisfactory to the Department; to be tempered and then annealed but not face-hardened, at the rate of $508.00 a ton of 2,240 pounds of finished and accepted appurtenances, bolts and nuts.

Second. It is expressly agreed that the party of the second part in its discretion may change the amounts of armor above designated as Class A and Class B by making either class greater or less in quantity, regardless of the thickness of plates: Provided, That if a decrease is made in one class a corresponding increase in such amount shall be made in the other.

Third. The party of the second part shall from time to time furnish the party of the first part with schedules of the above-named armor plates and appurtenances showing their various shapes and dimensions and the order in, and the dates on, which delivery will be required, and within a period of six months after the receipt of the first of said schedules and preliminary drawings sufficient to enable him to forge and rough-shape such armor, the party of the first part shall begin deliveries of armor, and shall continue at the rate of not less than 400 tons a month thereafter: Provided, That the party of the first part be furnished by the party of the
14 second part with the final detail drawings of each lot of armor at least four months prior to the required date of its delivery: And provided further, That the whole or any portion of the armor called for by this contract, if it shall be made in accordance with the specifications, and if it shall comply with the tests therein prescribed, shall be received by the party of the second part, if delivered in advance of the dates mentioned in said schedules, and be paid for in the usual manner, subject to the condition that it be delivered in the order prescribed in said schedules.

(*a*) At the end of each six calendar months, beginning from the time the first delivery is due, the total amount of armor delivered shall be reckoned, and if this amount is less than is due at that time by said schedules, the sum of ten dollars ($10) a ton on all armor due and not delivered, reckoning at the rate of 400 tons a month, shall be charged against the party of the first part, as and for liquidated and ascertained damages, but no such deductions shall be made against said party for delay in delivery caused by the party of the second part or its agents: Provided, That if at the end of any such six-monthly period the total amount of armor remaining to be delivered is less than six times the amount guaranteed per month, the time for reckoning deductions for delayed

deliveries on such armor shall be at the expiration of such fractional part of six months as the amount to be delivered is of six times the guaranteed monthly rate: And provided further, That if the party of the first part is under obligation to deliver armor under any contract or contracts previous to this contract, deliveries under such contract or contracts shall not be considered deliveries of armor under this contract so far as relates to the making of deductions for nondelivery.

(*b*) Paragraph 115 of the circular and specifications of the Navy Department concerning armor plate and appurtenances for
15 vessels of the United States Navy, approved by the Secretary of the Navy June 19, 1909, and forming a part of this contract, is so far modified as to agree with this article of this contract.

Fourth. The total weights and total price of the armor plate and appurtenances herein referred to are subject to such variations as may result from changes that may be made under provisions of the circular forming part of this contract relating to changes, or from the operation of other conditions therein contained that may affect the total price or aggregate weights aforesaid.

Fifth. All armor plates and appurtenances delivered under this contract shall be of domestic manufacture, and shall conform to and with all the details, requirements, and stipulations relating to material, manufacture, tests, and inspection, and in all respects to the conditions stated in the circular forming part of this contract.

Sixth. Notwithstanding the provisions contained in paragraphs (*a*) and (*b*) of the first article of this contract as to the kinds of armor to be furnished under Class A and Class B, and the provisions contained in the circular forming part of this contract as to the ballistic tests to be applied to such Class A and Class B armor, it shall be incumbent on the party of the first part to make every effort and incur all reasonable necessary expenses during the course of its manufacture to further improve the same and to furnish the highest quality of armor that is obtainable at the time of manufacture.

Seventh. It is mutually understood, covenanted, and agreed by and between the parties to this contract, that changes in the conditions or requirements of the circular hereinbefore referred to and which forms a part of this contract, may be made by and with the mutual consent of the parties hereto, and if changes are thus
16 made, the actual cost thereof and the damage, if any, caused thereby and the amount of the increased or diminished compensation, if any that the party of the first part shall be entitled to receive, in consequence of such change or changes, shall be ascertained, estimated and determined by a board of naval officers to be appointed by the Secretary of the Navy, and the determination of said board, or a majority thereof, shall be binding upon the party of the first part, and said party of the first part hereby expressly covenants and agrees to accept and abide by such determination, subject, however, to appeal to the Secretary of the Navy.

Eighth. It is further mutually understood, covenanted, and agreed, by and between the parties to this contract, that reasonable

consideration shall be extended to the party of the first part in case of unavoidable delay in the manufacture and delivery of the armor plates and appurtenances aforesaid provided it shall appear that the party of the first part has assumed the obligations of this contract in good faith and is prosecuting the work under the same with due diligence, in which case reasonable extensions of the periods prescribed for deliveries of the armor plates and appurtenances required under this contract shall be granted. In case any delay shall arise in the prosecution of the work required under this contract, such questions, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon the parties to this contract.

Ninth. It is further mutually understood, covenanted, and agreed that if at any stage of the work prior to the final completion of said armor plates and appurtenances, the Secretary of the Navy shall find that the party of the first part is unable to proceed with, and make satisfactory progress in, the manufacture and delivery
17 of the armor plates and appurtenances required and within the periods prescribed as aforesaid, including such extensions thereof, if any, as may have been granted under the eighth article of this contract, then and in such case as shall be optional with the Secretary of the Navy to declare this contract forfeited on the part of the party of the first part, and in case the Secretary of the Navy shall, under the provisions of this clause declare this contract forfeited, such forefeiture shall not affect the right of the United States to recover for defaults that may have occurred under this contract, and as liquidated damages, a sum of money equal to the penalty of the bond accompanying the same.

Tenth. The party of the first part in consideration of the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for or on account of the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented invention, article, process, or appliance that has been or may be adopted or used by the party of the first part, in or about the manufacture or production of said armor plates and appurtenances, or any part thereof, under this contract, and to protect and discharge the Government from all liability on account thereof or on account of the use thereof by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy.

Eleventh. It is mutually understood, covenanted, and agreed by and between the respective parties hereto that this contract shall not, nor shall any interest herein, be transferred by the party of the first part to any other person or persons.

Twelfth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Member of or Delegate to Congress, officer of the Navy, nor
18 any person holding any office or appointment under the Navy Department, is or shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; but this

stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract, it being made with an incorporated company.

Thirteenth. The United States, in consideration of the premises, do hereby contract, promise, and engage to and with the party of the first part as follows:

1. The contract price to be paid by the United States to the said party of the first part for armor plates and appurtenances manufactured and delivered under this contract shall be the prices per ton for each class as stated in paragraphs (*a*), (*b*), (*c*), (*d*), and (*e*) of the first article of this contract.

2. Payments under this contract shall be regulated and made in accordance with the provisions contained in this contract and in the circular aforesaid, with the following modifications, viz: Classes C, D, and E armor, as well as shutter and other plates for which final dimensions can not be given, so that they can be completed and shipped with the group to which they belong, will not be included in their respective groups so far as payments thereon are concerned, but all such plates and appurtenances will be paid for, subject to reservations under section 3, when completed, provisionally accepted, and shipped, or held, by direction of the party of the second part, for later delivery.

When all the plates of a group of armor are forged, the first payment therefor of 30 per cent of the contract price of the armor constituting said groups shall be made; a second payment of 30 per cent of the contract price of the group shall be made when all of the plates constituting said group have received their final treatment, and a third payment of 30 per cent of the contract
19 price when the group shall have been completed, accepted, and shipped, or held in whole or part, by direction of the party of the second part, for later delivery.

3. There shall be a reservation of 10 per cent from the price of each group of armor delivered under this contract, to be retained until the group shall have been completed: Provided, That such reservation on the last group pertaining to the armor for any particular vessel shall be retained until all the armor furnished by the party of the first part for such vessel has been in place for a period of six months in accordance with the requirements of the circular and specifications forming part of this contract.

In case of delay in placing the last group of armor on the ship, the reservation shall not be held for more than nine months after the shipment of the last plate of the group, excluding shutter plates, from the works of the party of the first part: Provided, That all armor required to be furnished under this contract shall be delivered and shipped before payment of said reservation.

4. No payment shall be made except upon bills, certified by the inspectors in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof. A lien of the party of the second

part upon said armor plates and the materials on hand for use in the construction thereof, respectively and collectively, for all moneys paid on account thereof, shall commence with the first payment, and shall thereupon attach to the work done and materials furnished, and shall in like manner attach, from time to time as the work progresses and as further payments are made, and shall continue until it shall have been properly discharged; and it is hereby further stipulated, covenanted, and agreed, and this contract is upon the express condition, that no lien shall lie or attach upon or against said armor plates or the materials therefor, or any part thereof or of either, in favor of any other party, person, or persons, firm, association, company, or corporation for or on account of any work done upon or about said armor plates or materials or of any materials furnished therefor or in connection therewith, nor for or on account of any other cause or thing or of any claim or demand of any kind against the said party of the first part, its successors, assigns, or legal representatives.

5. All warrants for payments under this contract shall be made payable to the party of the first part or its order.

6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on part of the party of the first part, it shall be entitled within ten days after the filing and acceptance of its claim, subject to the provisions of the circular hereinbefore mentioned relating to the replacing of rejected plates, to receive final payment under this contract on the execution of a final release to the party of the second part in such form and containing such provisions as shall be approved by the Secretary of the Navy of claims against the United States arising under or by virtue of this contract. Armor to replace rejected groups must be delivered within six months on the receipt, by the party of the first part, of notice of such rejection.

Fourteenth. If any doubts or disputes arise as to the meaning of anything in the circular aforesaid, or if any discrepancy appears between the same and this contract, except as expressly provided for in this contract, the matter shall be at once referred to the Secretary of the Navy for determination; and the party of the first part hereby binds itself and its successors and assigns and its legal representatives to abide by his decision in the premises. If, however, the party of the first part shall feel aggrieved at such decision of the Secretary of the Navy, it shall have the right to submit the same to the President of the United States, and his decision shall control.

Fifteenth. The party of the first part shall give a bond with satisfactory sureties for the faithful performance of the work embraced in this contract in a penal sum equal to 10 per cent of the total cost of the armor of Classes A, B, C, D, and E, as specified in article first of this contract, and at the end of each calendar year the amount of said bond may be reduced to correspond to the estimated cost of armor then undelivered under this contract.

In witness whereof the respective parties hereto have hereunto set their hands and seals the day and year first above written.

BETHLEHEM STEEL COMPANY,
A. JOHNSON, *First Vice-President.*
THE UNITED STATES, NEM,
[SEAL.] By W. P. POTTER,
As Acting Secretary of the Navy.

Signed and sealed in the presence of—
Attest:
JAMES KERNAN,
Ass't Secretary.
PICKENS NEAGLE,
Acting Solicitor, As to W. P. Potter,
Acting Secretary of the Navy.

22 EXHIBIT B.

Copy—F. S. R.
4174-107:72.

NAVY DEPARTMENT,
WASHINGTON, February 7, 1912.

From: Assistant Secretary, Lieutenant-Commander Orton P. Jackson, U. S. Navy, Bureau of Ordnance.

Subject: Cost of changes under contract of September 27, 1909. with Bethlehem Steel Company for armor.

A Board of which you are senior member and Lieutenants Ralston S. Holmes and William D. Greetham, U. S. N., members, is hereby appointed and will assemble at the works of the Bethlehem Steel Company, South Bethlehem, Pa., at 10:30 o'clock a. m., on the 8th instant or as soon thereafter as practicable. The junior member will act as recorder.

The Board will determine the compensation that should be paid the company on account of furnishing, as a change under the contract, armor for the fire control tower of the U. S. S. Arkansas, giving the contractors full opportunity to be heard, and will submit its report in duplicate through the Bureau of Ordnance.

This employment on shore duty is required by the public interests.

(Signed) WINTHROP.

23 Record of Proceedings of a Board.

Appointed for the purpose of determining the price per ton to be paid the Bethlehem Steel Company for the Fire Control Tower manufactured by said Company on an additional group of Armor for the U. S. S. Arkansas, under the contract of September 27, 1909.

Report was sent "in error" to Dept. before being taken upon Ord. files necessitating change of number.

2/21/12.

1 Enclosure. G: W.

February 9, 1912.

From Board on Changes to the Secretary of the Navy:

1. Pursuant to Navy Department's orders of February 1912, (copy appended, marked "A"), the Board met at 10.30 a. m., February 8, 1912, at the office of the Inspector of Ordnance, U. S. Navy, Bethlehem Steel Company's Works, South Bethlehem, Pa.:

Present:

Lieutenant Commander O. P. Jackson, U. S. N., Senior Member.
Lieutenant R. S. Holmes, U. S. N., Member.
Lieutenant W. D. Greetham, U. S. N., Member and Recorder.

2. The Board had before it all correspondence between the Bureau of Ordnance and the Bethlehem Steel Company relative to the subject in hand, and was also supplied with a complete set of drawings of the structure under consideration.

24 3. Messrs. H. T. Morris and E. G. Tice were present on behalf of the Bethlehem Steel Company, and presented to the Board such facts and explanations as were deemed necessary.

4. The Board finds as follows:

(*a*) That the barbette part of the structure, shown on Bureau of Ordnance drawings Nos. 331, 332 and 333, with the exception of additional machining, is the same type of armor as that designated as Class "A" in the Circular and Specifications of the Navy Department concerning Armor Plate and Appurtenances for Vessels of the U. S. Navy, approved June 19, 1909, annexed to and deemed a part of the Bethlehem Steel Company's contract of September 27, 1909, for armor for the U. S. S. Arkansas," and paid for at the rate of $430.00 per ton. For the additional machining the Board allows $10,000 per ton.

Actual weight of barbette (Class "A"):
35.59 tons at $430.00=$15,303.70

(*b*) That, on account of the size and difficulties encountered in the forging and machining of the "Revolving Ring," shown on Bureau of Ordnance drawing No. 328, an allowance of $810.00 per ton should be made.

Actual weight of "Revolving Ring":
16.71 tons at $810.00=$13,535.10

Carried forward... $28,838.80

(*c*) That the Top and Hatch Cover, shown on Bureau of Ordnance drawing No. 327, is of the same type of armor as that designated as Class "C" in the Specifications above referred to; that no unusual difficulties were encountered in their manufacture, and that they should be paid for at the rate of Class "C" armor, viz: $406.00 per ton.

Actual weight of Top and Hatch Cover:
5.97 tons at $460.00=$2,746.20

25 (*d*) That the Armor Bolts, shown on Bureau of Ordnance drawings Nos. 327 and 332, are of the same type of armor as that designated as Class "E" in the Specifications above referred to; that no unusual difficulties were encountered in their manufacture, and that they should be paid for at the rate of Class "E" armor, viz: $508.00 per ton.

Actual weight of Bolts:

0.24 tons at $508.00=$121.92

Total, for Fire Control Tower.. $31,706.92

5. The Board finds that the total weight of the Fire Control Tower is 58.51 tons, and that the Bethlehem Steel Company has asked $655.00 per ton for the actual weight of the complete structure, and that their figures would therefore be thirty-eight thousand, three hundred and twenty-four dollars and five cents ($38,324.05), as against the thirty-one thousand, seven hundred and six dollars and ninety-two cents ($31,706.92), which the Board considers reasonable and just.

6. The Board, having completed its duties at 12.30 p. m. adjourned:

O. P. JACKSON,
Lieutenant Commander, U. S. N., Senior Member.
R. S. Holmes,
Lieutenant, U. S. N., Member.
W. D. GREETHAM,
Lieutenant, U. S. N., Member and Recorder.

26 1st Endorsement.

No. 25517/8-(H). J. R. G./K. W.

February 14, 1912.

From Chief of Bureau of Ordnance to Secretary of the Navy:

Subject: Report of Board on cost of fire-control tower manufactured as an additional group of armor for U. S. S. Arkansas, by Bethlehem Steel Company under contract of September 27, 1909.

1. Forwarded, recommending approval of the report of the Board.

2. In this connection, in view of the fact that deliveries under the contract in question were completed March 7, 1911, by conning tower tubes, Group B8, for the Wyoming and Arkansas, on bill Nos. 66 and 67, (aside from the material covered by the within report, which is additional), and that payment of the reservations was due nine months thereafter, or December 7th last, it is further recommended that the contractors be reimbursed for the expenses incurred in renewal of the bond under the contract covering the delay involved in final settlement, representatives of the Bethlehem Steel Company having requested consideration on this matter in hearing of the Board.

TWINING.

This report was sent "in error" to Dept. before being taken upon Bu. Ord. files necessitating a change in the number.

2/21/12.

27 4174-107-73.

2d Endorsement. Dr.

NAVY DEPARTMENT,
WASHINGTON, February 20, 1912.

From: Department to Bureau of Ordnance.

Subject: Report of Board on cost of fire-control tower manufactured as an additional group of armor for U. S. S. Arkansas, by Bethlehem Steel Company under contract of September 27, 1909.

The Department approves as recommended by the Bureau in its endorsement (1st) herewith, the within report of the Board determining that the Bethlehem Steel Company is entitled to an increased compensation of $31,706.92, for furnishing armor for fire-control tower for the Arkansas, under its contract of September 27, 1909.

With reference to the recommendation made by the Bureau that the contractors be reimbursed for the expense incurred by them in renewing the bond under the contract covering the delay involved in furnishing the armor for which extra compensation is allowed, the Bureau will be governed by the Department's decision (No. 26548-32:21), as contained in its endorsement (3d) to the Bureau relative to the claim of the Midvale Steel Company for reimbursement of the cost of renewing bond to cover delay caused by authorized changes under its contract of November 29th, 1909.

WINTHROP.

28 EXHIBIT C.

4174-107-78. L.
(Copy R. A. W. 5-17-12.)

NAVY DEPARTMENT,
WASHINGTON, May 15, 1912.

From: Department to Lieutenant-Commander Orton P. Jackson, U. S. Navy, (Bureau of Ordnance).

A Board, consisting of you as senior member, of Lieutenant Ralston S. Holmes, U. S. Navy, as member, and of Lieutenant William D. Greetham, U. S. Navy, as member and recorder, is hereby appointed, and will assemble at the works of the Bethlehem Steel Company, South Bethlehem. Pa., on Friday, the 17th instant, or as soon thereafter as practicable, for the purpose of determining the amount of increased or decreased compensation due the Bethlehem Steel Company under its contracts of June 22, and September 27, 1909, for furnishing projectiles and armor.

The Bureau of Ordnance will furnish the Board with copies of the contracts mentioned, and with such other information as the Board may deem essential to a proper performance of the duties hereby devolved upon it.

The report of the Board to the Department will be made in triplicate.

(Sd.) WINTHROP.

"A."

1. Enclosure.

May 17, 1912.

From: Board on Changes to Secretary of the Navy.

1. Pursuant to Navy Department's orders of May 15, 1912, (copy appended, marked "A"), the Board met at 1 P. M., Friday,
29 May 17, 1912, at the office of the Inspector of Ordnance, U. S. Navy, Bethlehem Steel Company Works, South Bethlehem, Pa.:

Present:

Lieutenant Commander O. P. Jackson, U. S. N., Senior Member,
Lieutenant R. S. Holmes, U. S. Navy, Member,
Lieutenant W. D. Greetham, U. S. Navy, Recorder and Member.

2. The Board had before it all correspondence between the Bureau of Ordnance and the Bethlehem Steel Company relative to the subject in hand.

3. Mr. E. G. Tice was present on behalf of the Bethlehem Steel Company, and presented to the Board such facts and explanations as were deemed necessary.

4. The Board then took up the case of increased compensation of the Bethlehem Steel Company in its contract of September 27, 1909, for furnishing armor.

5. The last armor under this contract (bolts and nuts for the Wyoming turrents) was delivered May 2, 1911. The Company's bond expired September 27, 1911. It was then renewed for three (3) months to December 27, 1911. Under date of December 27, 1911, the Company gave bond for $3,500.00 to cover armor (fire control tower for the Arkansas) which was delivered as a change under the original contract; also under this same date, December 27, 1911, bond for $30,000.00 for defective plates, liabilities for which had not expired.

6. The Board finds "that the Company is entitled to be reimbursed for the expense incurred in renewing the bond for $195,000.00 at the rate of $4899.10 per year, from December 27, 1911, to May 25,
1912, (the Board allowing the time up to this date for the
30 cancellation of the bond), and that the amount of $2373.96 be allowed the Bethlehem Steel Company for this renewal upon the presentation of information to the effect that such amount has been paid by said Company."

7. The Board furthermore considers the Company is entitled to extra compensation for the renewal of the bond for $195,000.00 from September 27, 1911, to December 27, 1911, and from May 3,

1911, until September 27, 1911; that the amount of compensation for this aggregate period (i. e., from May 3, 1911, until December 27, 1911), for premium on bond for $195,000.00, at $2.50 per $1,000.00, on the value of the contract, less the premium on bond for $30,000.00 at $2.50 per $1,000.00, covering defective plates, and $3,500.00 for fire control armor, which would be required provided the original bond is cancelled, is $3,135.66. This is the amount of premium paid by the Company during this period, less the amount that they would have been required to pay had the original bond been cancelled.

8. Total reimbursement should therefore be $2,637.19 plus $3,135.66, or a grand total of $5,772.19 additional compensation due the Bethlehem Steel Company for expense incurred in renewing bond for armor under contract of September 27, 1909.

O. P. JACKSON,
Lieutenant Commander, U. S. N., Sen. Member.
R. S. HOLMES,
Lieutenant, U. S. N., Member.
W. D. GREETHAM,
Lieutenant, U. S. N., Member and Recorder.

31 2nd Endorsement.

25517/16 (H)-O.

From: Chief of Bureau of Ordnance to Secretary of the Navy.

Subject: Report 5/17/12, of board as to cost of changes under contract of Sept. 27, 1909, with Bethlehem Steel Company for armor plate.

1. Returned.

2. The Bureau approves that portion of the report of this Board that the Bethlehem Steel Company be reimbursed to the sum of $2,373.96, being the amount of expenses incurred in renewing bond for $195,000.00 at the rate of $4,899.10 per year from December 27, 1911, to May 25, 1912, upon the receipt of information from the Bethlehem Steel Company that this amount had been paid by said Company.

3. There is no record of the Bethlehem Steel Company having made any official request for the cancellation of the bond for $195,000.00 on May 2nd, the date of delivery of the last plate under the original contract, and inasmuch as no application was made during the period from May 2nd to December 27th for a cancellation of the bond previous to December 27, 1911, the Bureau does not recommend the approval of that portion of the report of this Board that the reimbursement of $3,135.66 be made to the Bethlehem Steel Company.

4. In this connection, the Bureau does not consider the Government under any obligation to inform the Company to request a reduction of their bond or to have their bond reduced.

TWINING.

32 Copy—M. L. F.

NAVY DEPARTMENT,
Washington, July 18, 1912.

No. 4174-107-79.

3rd Endorsement.

From: Acting Secretary to Bureau of Ordnance.

Subject: Report of Board, 5/17/12, as to claim of Bethlehem Steel Co., for additional compensation under contract of Sept. 27, 1909, for armor plates.

Returned.

In paragraphs 5 and 6 of its report, the board states:

"5. The last armor under this contract (bolts and nuts for the Wyoming turrets) was delivered May 2, 1911. The company's bond expired September 27, 1911. It was then renewed for three (3) months to December 27, 1911. Under date of December 27, 1911, the company gave bond for $3,500.00 to cover armor (fire control tower for the Arkansas) which was delivered as a change under the original contract; also under this same date, December 27, 1911, bond for $30,000 for defective plates, liabilities for which had not expired.

"6. The Board finds that the Company is entitled to be reimbursed for the expense incurred in renewing the bond for $195,000.00 at the rate of $4,899.10 per year, from December 27, 1911, to May 25, 1912, (the Board allowing the time up to this date for the cancellation of the bond), and that the amount of $2,373.96 be allowed the Bethlehem Steel Company for this renewal upon the presentation of informattion to the effect that such amount has been paid by said company."

In paragraph 7 it further states:

"7. The Board furthermore considers the company is entitled to extra compensation for the renewal of the bond for $195,-
33 000.00 from September 27, 1911 to December 27, 1911, and from May 3, 1911, until September 27, 1911; that the amount of compensation for this aggregate period i. e., from May 3, 1911 until December 27, 1911), for premium on bond for $195,000.00 at $2.50 per $1,000.00, on the value of the contract, less the premium on bond for $30,000.00 at $2.50 per $1,000.00, covering defective plates, and $2,500.00 for fire control armor, which would be required provided the original bond is canceled, is $3,135.66. This is the amount of premium paid by the company during this period, less the amount that they would have been required to pay had the original bond been cancelled."

With reference to this last finding, the Bureau says, in its endorsement (2) herewith:—

"There is no record of the Bethlehem Steel Company having made any official request for the cancellation of the bond for $195,000.00

on May 2nd, the date of delivery of the last plate under the original contract, and inasmuch as no application was made during the period from May 2d to December 27th for a cancellation of the bond previous to December 27, 1911, the Bureau does not recommend the approval of that portion of the report of this Board that the reimbursement of $3,135.66 be made to the Bethlehem Steel Company.

"In this connection, the Bureau does not consider the Government under any obligation to inform the company to request a reduction of their bond or to have their bond reduced.

The Department concurs in the view of the Bureau that it is not incumbent on the Government to have the company ask for a reduction in its bond or to have the bond reduced in amount in the absence of such request; and, accordingly, no request for a decrease in the bond having been made before December 27, 1911, the last
34 mentioned finding of the board is not approved.

The same reason would exclude compensation for a part of the period covered by the first finding. The company, under date of January 7, asked that the bond be cancelled, and, assuming this to be an adequate basis for the Department's action, and the company's claim to be otherwise valid, this date, rather than December 27, would seem to mark the beginning of the reimbursement period; and as the bond for $30,000, accepted as superseding original bond as of date December 27, 1911, was approved May 15, 1912, the latter date rather than the one given by the board, May 25, should mark its end. Accordingly, if reimbursement were due the company for premium for the early period of this year, it should not exceed the proportionate amount chargeable for the time from January 27 to May 15.

Upon other grounds, however, it is not apparent that any of the expense is a proper charge against the Government. The original bond covered not only the initial delivery of the armor, but also, the company's obligations to replace defective plates. The liability of the bond did not, therefore, cease upon the delivery of the last plate of the original armor May 2, 1911; it continued thereafter and but for the acceptance of a superseding bond would still subsist. The theory on which the Government is chargeable with the cost of extending the bond is that such extension is incidental to a change in the contract and therefore an element of the cost of the change. In the present instance the continuance of the bond in force does not appear to have been an incident of the change involving the fire control tower for the Arkansas; the necessity for a bond existed independently of the change.

35 The company's request of January 27 for the cancellation of the bond was one that could not be granted. The acceptance of a smaller bond to supersede the old one was agreed upon in due course and there appears to be nothing in the surrounding circumstances that casts any legal obligation upon the Government to pay the premium upon the first bond pending the closing of the transaction.

The Department is of opinion that no part of the cost of the old

bond is a proper charge against the Government, and the findings of the board are, therefore, disapproved.

(Signed) BEEKMAN WINTHROP.

36 *II. Traverse, Filed March 8, 1916.*

In the Court of Claims of the United States, December Term, A. D., 1915.

No. 32892.

BETHLEHEM STEEL COMPANY
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and Answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

37 III. *History of Proceedings.*

On March 8, 1916 this case was argued by Mr. James H. Hayden, for the claimant, and by Mr. M. H. Farrington, for the defendants.

On April 10, 1916 the court filed findings of fact and conclusion of law, and entered judgment for claimant in the sum of $3,170.69, with an opinion by Barney, J.

On May 13, 1916 the claimant filed a motion for amendment of findings of fact and for a rehearing, which was submitted to the court.

On June 5, 1916 the claimant's motion to amend findings was allowed in part and overruled in part. Former findings were withdrawn and amended findings were filed. Judgment and opinion to stand.

38 IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court.*

Filed June 5, 1916.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant, the Bethlehem Steel Co., is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Pennsylvania.

II.

On September 27, 1909, the claimant, of the one part, and the United States, represented by the Secretary of the Navy, of the other part, entered into a contract in writing, which had been prepared by the Navy Department. This contract, together with the "circular and specifications of the Navy Department concerning armor plate and appurtenances for vessels of the United States Navy" made a part of said contract by the terms thereof, were both attached to and made a part of the amended petition. By the contract the claimant agreed to manufacture and deliver to the Navy Department certain armor plates for use in the construction of battleships, all of which plates were described specifically in Article I of the contract. In consideration thereof the United States agreed to make certain payments and to do and perform certain acts.

III.

The claimant manufactured all of the armor plates specified in Article I of the contract and all of the same were provisionally accepted by the Navy Department and delivered by the claimant, from time to time, on or before May 2, 1911.

The last plate on the Wyoming was fitted in place April 18, 1911, and on March 5, 1912, two defective plates had not been
39 replaced by claimant. The last plate on the Arkansas was fitted in place December 15, 1911; several plates found to be defective had not been replaced by claimant on March 5, 1912. Plates delivered under Article I of the contract and worth, at contract rates, $202,620.60, were found defective March 26, 1912, and claimant called on to replace the same. The last defective plate furnished under Article I of the contract was replaced by claimant on November 22, 1912.

On or about November 30, 1910, the Navy Department gave the claimant an order to furnish armor plates for the fire-control tower of the battleship No. 33 (Arkansas). These plates were not included among those specified in Article I of the contract and it was agreed by the parties that the furnishing of such additional armor would be considered a change in the terms of the contract and specifications, and dealt with in the manner provided by Article VII of the contract. The additional armor plates were furnished by the claimant on or about February 7, 1912, but on that date six months had not elapsed since certain of them had been fastened on the ship.

IV.

September 28, 1909, the claimant furnished, and the Secretary of the Navy accepted, a bond in the penal sum of $195,000, executed by it as principal with the Empire State Surety Co., of New York, and the Fidelity & Deposit Co., of Maryland, as sureties, the condition of which reads as follows:

"The condition of the above obligation is such that if the above

bounden principal, the Bethlehem Steel Company, shall well and truly perform and fulfill its contract dated September 27, 1909, entered into with the United States, represented by the Secretary of the Navy, for manufacturing and delivering to the Navy Department in the manner prescribed and in accordance with the conditions stated in the Circular and specifications of the Navy Department, concerning armor plate and appurtenances for vessels of the United States Navy,' approved by the Secretary of the Navy June 19th, 1909, which is annexed to said contract and forms a part of the same, the steel armor plate and appurtenances therein described under the heading 'Contract for steel armor plates and appurtenances for battleships Nos. 32, 33, or such other ships as may be selected,' conforming in all respects to the stipulations, covenants, and conditions of said contract, then the above obligation to be void and of no effect, otherwise to be and remain in full force and virtue."

The said surety companies charged the claimant for their suretyship premiums at the rate of $4,899.10 per annum. The amount of the annual premium was computed upon the amount of the penalty of the bond. The premiums were paid by the claimant for the whole of the period during which the said bond remained uncanceled, namely, from September 28, 1909, to May 15, 1912.

V.

The department preserved a record of all deliveries of armor plates made by the plaintiff under its contract, but the particular dates when the several installments were delivered the record
40 in this case does not show. The claimant's bond above mentioned was not reduced by the Secretary of the Navy at the end of each separate calendar year between September 27, 1909, and May 2, 1911, nor did the Secretary cancel the said bond or terminate the obligation thereof on May 2, 1911, on which date the claimant delivered the last installment or group of the said armor plates.

No reduction of the bond required and given as provided by said Article XV was made by the Government and no such reduction was asked for by the plaintiff until January 27, 1912. Prior thereto, on November 16, 1911, the claimant wrote a letter to the chief clerk of the Bureau of Ordnance, Navy Department, calling attention to the contract covering armor plate furnished by claimant for battleships Nos. 32 and 33, and stating that it would appreciate it if he would set the necessary machinery in motion and have the surety company advised of the cancellation of two bonds, one of them being the one in question in this case. The Secretary then refused to relieve the plaintiff from the obligations of said bond except upon the following terms: (1) It was to be understood that all the armor originally required by the contract was delivered nine months or more ago and that the additional armor for the fire-control tower of the Arkansas ordered November 30, 1910, as a change under the contract had been delivered within the last few days, the contract having therefore been completed subject to the obligation given to replace rejected plates; (2) additional armor required for the fire-

control tower of the Arkansas should be treated as the last group under the original contract, and a reservation of 10 per cent of its cost when determined should be retained as contemplated by paragraph 3 of clause 13 of the contract. The reservation on previous groups to be paid subject, however, to the assent of the sureties on the bond unless it was found that all the armor originally required had been fastened on the ships for six months and that all of said armor proving defective had been replaced; (3) that to secure the replacement of any plates of the fire-control tower of the Arkansas that might prove defective the plaintiff should give a bond in a sum equal to 10 per cent of the cost of the same. Upon these conditions the Secretary agreed to consider the bond of $195,000 as fulfilled except with regard to the replacement of rejected armor plates, but refused to cancel the same. In compliance with the foregoing requirement the claimant, on February 26, 1912, furnished a bond in the penal sum of $3,500, conditioned for the replacing of any armor plates of the said fire-control tower that might develop defective after delivery and within six months after being fastened on the vessel.

The penalty of the bond represented something more than 10 per cent of the cost of the additional armor, the same having been ascertained in the sum of $31,706.92 by a board of officers appointed by the Secretary for that purpose, and said report having been approved by the Secretary and accepted by the claimant. On March 9, 1912, said bond for $3,500 was approved by the Secretary, but he refused to order the cancellation of the original bond. At the same time the Secretary made a second proposition to the claimant, whereby he offered to order the cancellation of the original bond as of December 27, 1911, provided that the claimant would
41 furnish a third bond in such penalty as the Bureau of Ordnance might name, conditioned for the fulfillment of the claimant's obligation to furnish replacing plates. While expressing the belief that under Article XV of the contract it was entitled to have its bond reduced at the end of each calendar year to an amount of the 10 per cent of the value of armor then remaining undelivered, and that plates to be replaced were not to be considered as armor undelivered, the claimant consented thereto, and on May 8, 1912, did furnish a third bond in the penal sum of $30,000. This bond was approved by the Secretary on May 15, 1912, on which date the original bond was considered by the Secretary as superseded by said $30,000 bond as of December 27, 1911.

VI.

On May 15, 1912, the Secretary of the Navy appointed another board of naval officers for the purpose of determining the amount of increased or decreased compensation due claimant under the original contract in question. Said board made its report, recommending in substance that the claimant was entitled to extra compensation for the premium paid upon said bond of $195,000 from May 3, 1911, to May 25, 1912. On June 28, 1912, the Secretary

of the Navy disapproved of this board's recommendations, holding that the cost incurred by the claimant for the renewal of the original bond was an outlay required by the contract as originally written.

VII.

Of said sum of $31,706.92 due the claimant for the armor for the fire-control tower of the Arkansas $28,536.23 has been paid; the remaining $3,170.69 has not been paid pending settlement of this suit.

The claimant expended the sum of $3,135.66 for premium on said bond for $195,000 for the period from May 3, 1911, to December 27, 1911, and also expended the sum of $2,373.96 for premium on said bond for the period from December 27, 1911, to May 12, 1915, making in all the sum of $5,509.62.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to judgment of and from the United States in the sum of three thousand one hundred and seventy dollars and sixty-nine cents ($3,170.69).

Opinion.

Barney, Judge, delivered the opinion of the court:

This is a suit arising out of a contract to furnish armor plates to the Navy Department. The claim is for additional expenses incurred in carrying the bond required under the terms of the contract to be given by the plaintiff, and the question at issue is during what time and for what sums the plaintiff was required to keep said bond in force. Article XV of the contract is as follows:

"Fifteenth. The party of the first part (Bethlehem Steel Company) shall give a bond with satisfactory sureties for the
42 faithful performance of the work embraced in this contract in a penal sum equal to ten per cent of the total cost of the armor of classes A, B, C, D, and E, as specified in article first of this contract, and at the end of each calendar year the amount of said bond may be reduced to correspond to the estimated cost of armor then undelivered under this contract."

As required by this article of the contract, the plaintiff furnished a bond in the sum of $195,000, that sum being something more than 10 per cent of the total cost of the armor required to be furnished by the terms of the contract. From time to time the plaintiff made deliveries in installments of armor plates as provided by Article 1 of the contract, a record of which was kept by the department, and all of the armor plate called for by the contract was delivered in the manner above stated on or before May 2, 1911. As to the particular dates when the several installments were delivered, the record does

not show. No reduction of the bond required and given, as provided by Article XV, was made by the Government, and no such reduction was asked for by the plaintiff until January 27, 1912. The Secretary of the Navy refused to relieve the plaintiff from the obligations of said bond except upon the following conditions: (1) That the additional armor required for the fire-control tower of the Arkansas should be treated as the last group under the original contract, and a reserve of 10 per cent of its cost when determined should be retained, as contemplated by paragraph 3 of clause 13 of the contract, the reservation on previous groups to be paid subject, however, to the assent of the sureties on the bond, unless it was found that all the armor originally required had been fastened on the ship for six months and that all of said armor proving defective had been replaced. (2) That to secure the replacement of any plates of the fire-control tower of the Arkansas that might prove defective the plaintiff should give a bond in a sum equal to 10 per cent of the cost of the same. Upon these conditions the Secretary agreed to consider the bond of $195,000 as fulfilled, except with regard to the replacement of rejected armor plates, but refused to cancel the same. In compliance with this condition the plaintiff furnished the bond in the sum of $3,500, conditioned for the replacing of any armor plates of the said fire-control tower that might prove defective.

March 9, 1912, the Secretary of the Navy offered to cancel the original bond if the plaintiff would furnish a third bond in the sum of $30,000 conditioned for the fulfillment of the plaintiff's obligation to furnish replacing plates under the original contract. The plaintiff furnished this bond, which was approved, and the $195,000 bond was considered as superseded. A board appointed for that purpose by the Secretary of the Navy found the cost of the additional armor for the fire-control tower of the Arkansas to be $31,706.92, which report was approved by the said Secretary and accepted by the plaintiff. Of this amount there still remains unpaid to the plaintiff the sum of $3,170.69.

It is contended by the plaintiff that by the terms of Article XV of the contract above quoted, to be construed in connection with certain provisions of the specifications, the Secretary of the Navy was obligated to cancel said bond of $195,000 on May 2, 1911, that being the date when the last group of armor plates was provisionally delivered under the original contract, while it is contended
43 by the defendants that said bond by its terms should remain in full force and effect until the final completion of the contract, i. e., until the provisions of section 75 of the specifications had been fully complied with. Said section 75 is as follows:

"75. Plates that develop defects after delivery sufficient to cause rejection, or that show cracks, due to faulty manufacture, within six months after being fastened on the ship, must be replaced by the contractor without delay, and the actual cost and the damage, if any, to the shipbuilders due to the installation and removal of such defective plates must be paid by the contractors."

We are constrained to agree with the plaintiff that the bond required by Article XV above quoted was only for the provisional de-

livery of the armor plate as required by the contract, and had no reference to the replacement of such armor plate as might prove defective. We come to this conclusion (1) from the fact that the word "delivery" as used in all other parts of the contract has reference only to such conditional delivery; (2) the language of section 3 of Article XIII of the contract indicates to our minds that the reservation of 10 per cent from the price of each group as delivered was intended to secure the defendants from damages on account of defective armor plates. That section is as follows:

"3. There shall be a reservation of 10 per cent from the price of each group of armor delivered under this contract, to be retained until the group shall have been completed: Provided, That such reservation on the last group pertaining to the armor for any particular vessel shall be retained until all the armor furnished by the party of the first part for such vessel has been in place for a period of six months, in accordance with the requirements of the circular and specifications forming part of this contract."

(3) Any other construction of said Article XV would render the provision for the reduction of the bond absolutely nugatory, for if we construe it to be reduced only after the full performance of the contract by the plaintiff, i. e., not until after all defective plates had been delivered and accepted, there would be no benefit accruing to the plaintiff, because it would then be canceled by operation of law and there could have been no intermediate reduction. We can not agree with the contention of the defendants that the condition of the bond being for the performance of the contract that that necessarily means for the final performance of the contract, for Article XV was a part of the contract; and if it in any way limited the application of the bond it must be construed as well as any other provision of the contract.

It is elementary that where the language of an instrument requires construction it shall be taken most strongly against the party preparing the instrument. Garrison v. United States, 7 Wall., 688; Simpson v. United States, 31 C. Cls., 392.

The result of our opinion as to the interpretation to be given to Article XV is that the conditions of the bond for $195,000 had been fully complied with on May 2, 1911, when the last armor plate was provisionally delivered and accepted. If the plaintiff incurred any further expense in carrying that bond after that date, it was a voluntary act on its part, and any expense incurred by it is not a charge against the defendants. It is true that in response to the de-
44 mand of the plaintiff for the cancellation of this bond the Secretary of the Navy offered to do so if the plaintiff would furnish another bond in the sum of $30,000, conditioned for the replacement of defective armor plates. The plaintiff furnished this additional bond and the Secretary of the Navy expressed himself as considering the original bond superseded. The expense of this bond to the plaintiff was unnecessary, and if the Secretary of the Navy, by threatening annulment of the contract or the threatening deprivation of any right under it, had compelled the plaintiff to incur this expense and he had furnished it under protest, it is possible

that it might recover for such unnecessary expense. None of these conditions appears. On the contrary, this change in the bonds appears to have been an arrangement with which the plaintiff was entirely satisfied.

It follows, therefore, that the expense incurred by the plaintiff in this behalf was without protest, and indeed voluntary, and for which there can be no recovery. It might be here remarked that both parties seem to have construed the original bond as securing the entire performance of the contract until January 27, 1912, when the plaintiff asked for its cancellation. Such request was not necessary, as the bond was then functus officio. It does not appear that at the end of the calendar years 1909 or 1910 there was any occasion for the reduction of the bond under Article XV, and no reason occurred for such action during the whole life of the contract relating to the provisional delivery of armor plate, for on the 2d day of May, 1911, all of the armor plate was provisionally delivered and accepted and on that date all of its conditions had been complied with, and, of course, it then required no reduction to relieve the plaintiff from further expense under it.

It follows from the foregoing that the plaintiff is not entitled to recover for any expense incurred by it in maintaining the $195,000 bond subsequent to May 2, 1911, but is entitled to judgment in the sum of $3,170.69, the balance due upon the contract for the furnishing of the armor for the fire-control tower of the Arkansas as found in Finding VIII.

45 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington, on the 5th day of June, A. D., 1916, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, The Bethlehem Steel Company, do have and recover of and from the defendants, the United States, the sum of Three Thousand One Hundred and Seventy Dollars and sixty-nine cents ($3,170.69).

BY THE COURT.

46 VI. *Application for, and Allowance of, Appeal.*

From the judgment rendered in the above entitled cause on the fifth day of June, 1916, in favor of the claimant, findings of fact filed June 5, 1916, the claimant on the date last mentioned, makes application for and gives notice of an appeal to the Supreme Court of the United States.

JAMES H. HAYDEN,
Attorney for Claimant.

Filed June 5, 1916.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

June 6, 1916.

47 Court of Claims.

No. 32892.

THE BETHLEHEM STEEL COMPANY
vs.
THE UNITED STATES.

I, Samuel A. Putman, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of a history of proceedings; of the findings of fact, conclusion of law, and opinion of the court; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 7th day of June, A. D., 1916.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 25,353. Court of Claims. Term No. 523. Bethlehe mSteel Company, appellant, vs. The United States. Filed June 13th, 1916. File No. 25,353.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 191.

BETHLEHEM STEEL COMPANY, *Appellant,*

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement of the Case.

The Court of Claims gave judgment in favor of the Bethlehem Steel Company for $3,170.69, admitted to be payable on account of armor plate furnished by the company, under contract with the Navy Department, but denied another item of the claim amounting to $5,509.62, which represented the extra cost to which the company was put, in the performance of the contract, by reason of a change in its terms. The company appealed (pp. 25, 28).

In substance the facts found are these (pp. 21-25): The contract in suit (pp. 7-13) was made between the Bethlehem Steel Company and the Navy Department on September 27, 1909. The instrument was drawn up by the Department. The company engaged (Article First) to make and furnish to the Department armor plate of several kinds and quantities, it being stipulated that the manufacture and test of the armor and the contractor's guaranties

with respect to its efficiency should meet the requirements of an elaborate circular or specification, which was made a part of the contract. It was provided (Article Seventh) that this specification might be changed by mutual agreement of the parties and in that event the contractor's compensation would be re-adjusted through the agency of a board, appointed by the Secretary of the Navy. It was further provided (Article Fifteenth) that the company would give bond with sureties to secure performance of some but not all of the obligations that it assumed by the contract. The portions of the contract now drawn in question are as follows:

> *First.* The party of the first part will, at its own risk and expense, manufacture and deliver to the Navy Department, in the manner prescribed and in accordance with the conditions stated in the "Circular and Specifications of the Navy Department concerning Armor Plate and Appurtenances for Vessels of the United States Navy," approved by the Secretary of the Navy, June 19, 1909, which is hereto annexed and which shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein, the steel armor plate and appurtenances therein described or referred to and herein designated, at the prices per ton hereinafter specified for the different classes and quantities of armor, * * * (p. 7).
>
> *Seventh.* It is mutually understood, covenanted, and agreed, by and between the parties to this contract, that changes in the conditions or requirements of the circular hereinbefore referred to and which forms a part of this contract, may be made by and with the mutual consent of the parties hereto, *and if changes are thus made, the actual cost thereof and the damage, if any, caused thereby and the amount of the increased or diminished compensation, if any, that the party of the*

first part shall be entitled to recive, in consequence of such change or changes, shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the Secretary of the Navy, and the determination of such board, or a majority thereof, shall be binding upon the party of the first part (company), and said party of the first part hereby expressly covenants and agrees to accept and abide by such determination, subject, however, to appeal to the Secretary of the Navy. (P. 9.)

Fifteenth. The party of the first part shall give a bond with satisfactory sureties for the faithful performance of the work embraced in this contract in a penal sum equal to 10 per cent of the total cost of the armor of Classes A, B, C, D, and E, as specified in article first of this contract, *and at the end of each calendar year the amount of said bond may be reduced to correspond to the estimated cost of armor then undelivered under this contract* (p. 12).

In its second finding the court said (p. 22):

"This contract, *together with the 'Circular and specifications of the Navy Department concerning armor plate and appurtenances for vessels of the United States Navy' made a part of said contract by the terms thereof, were both attached to and made a part of the amended petition.*"

The court was mistaken in saying that the circular and specifications were attached to the amended petition. Perhaps it had in mind a paragraph contained in the body of the petition (p. 2), which reads:

"By the Circular of Specifications, it was required, among other things, that any armor plates furnished by the claimant, which, *after their delivery,* might develop defects sufficiently serious to cause their rejection, or

> which might show cracks, due to faulty manufacture, within periods of six months after the same, should have been fastened on the ship to which they might be assigned, would be replaced by the claimant without delay (Sec. 75)."

In the opinion filed by the court, section 75 of the specification is given as follows (p. 26):

> "75. Plates that develop defects *after delivery* sufficient to cause rejection, or that show cracks, due to faulty manufacture, within six months after being fastened on the ship, must be replaced by the contractor, without delay, and the actual cost and the damage, if any, to the shipbuilders due to the installation and removal of such defective plates must be paid by the contractors."

The company manufactured the armor plates specified in Article First of the contract and they were provisionally accepted by the Department and *delivered* by the company from time to time, up to May 2, 1911, when the last of them was *delivered*. Some of them developed defects *after delivery* and *within six months after being fastened on the ships* to which they were assigned. In some instances considerable intervals elapsed between the *delivery* of a plate and its installation on the ship. This accounts for the fact one plate was not found defective until March 26, 1912, or nearly eleven months after the contractor had completed the *deliveries* of all of the armor. Again, it is found that on November 22, 1912, or more than eighteen months after the contractor had *delivered* all of the plates called for by Article First, it replaced one of them, in fulfillment of a requirement of the specifications (Sec. 75).

On November 30, 1910, the Department gave the claimant an order to furnish armor plates for the fire control

tower of the battleship "Arkansas." These were in addition to the armor called for by Article First of the contract, but it was agreed by the parties that the furnishing of such additional armor would be considered a change of the terms of the contract and dealt with in the manner provided by Article Seventh (supra). The additional plates were delivered by the contractor about February 7, 1912, but on that date, six months had not elapsed since certain of them had been fastened on the ship (*Finding III, p. 22*).

On September 28, 1909, the day after the contract was signed, the company furnished, and the Secretary approved, a bond in the penal sum of $195,000, executed by the company, as principal, with the Empire State Surety Company of New York, and the Fidelity & Deposit Company of Maryland, as sureties. The condition of the bond read (*Finding IV, pp. 22-23*):

> "* * * that if the above bounden principal, the Bethlehem Steel Company, shall well and truly perform and fulfill its contract dated September 27, 1909, entered into with the United States, represented by the Secretary of the Navy, for manufacturing and delivering to the Navy Department in the manner prescribed and in accordance with the conditions stated in the 'Circular and specifications of the Navy Department, concerning armor plate and appurtenances for vessels of the United States Navy,' approved by the Secretary of the Navy, June 19th, 1909, which is annexed to said contract and forms a part of the same, the steel armor plate and appurtenances therein described under the heading 'Contract for steel armor plates and appurtenances for battleships Nos. 32, 33, or such other ships as may be selected.' conforming in all respects to the stipulations, covenants and conditions of said contract, then the above obligation to be void and of no effect, otherwise to be and remain in full force and virtue."

For this bond, the surety companies charged, and the claimant paid, premiums at the rate of $4,899.10 a year (*Finding IV*, p. *23*).

The Department kept a record of all deliveries of armor, but nevertheless did not reduce the amount or penalty of the bond, as required by Article Fifteenth (*supra*). On May 2, 1911, when all of the armor plate called for by the Article First had been *delivered*, and, under the terms of Article Fifteenth, the amount or penalty of the bond should have been reduced to nothing, that is to say, the bond should have been cancelled, the Department failed to cancel it and in consequence the company was compelled to renew it.

No formal demand was made for the reduction or cancellation of the bond until January 27, 1912, though on November 16, 1911, the company wrote to the Chief Clerk of the Bureau of Ordnance requesting him to take proper steps to secure its cancellation. The Secretary then refused to cancel the bonds or even reduce its penalty, but offered to treat its obligation as fulfilled, provided: (1) That it be admitted that all of the armor required by the original contract had been *delivered* on or before May 2, 1911, or nine months prior to the date of the formal demand for cancellation of the bond, also that the additional armor for the fire control tower of the "Arkansas" had been *delivered* a few days prior to the demand, also that the performance of the contract had been completed, subject to the contractor's obligation to replace plates that might develop defects, as provided by Section 75 of the specifications; (2) That the additional armor for the fire-control tower of the "Arkansas" should be treated as the last group of armor called for by the original contract and a reservation of ten per centum of its cost (when ascertained) should be retained by the Department until the contractor's obligation should have been fully discharged. Also that the reservations withheld by

the Department from the compensation payable to the contractor for groups delivered earlier should be paid by the Department, upon the company's furnishing the assent of its sureties to such payments; (3) That to secure the replacement of any plates of the fire-control tower of the "Arkansas" which might prove defective, the Bethlehem Company would give a new bond in a sum equal to ten per centum of the cost of the additional armor. The Bethlehem Company consented to those terms, and on February 26, 1912, furnished a bond for the replacement of any of the additional armor that might develop defects. On March 9, 1912, this bond was approved by the Secretary, but he refused to cancel the original bond or terminate its obligation as he had agreed, and said that he would not do so unless the company would furnish still another bond, conditioned for the fulfillment by the contractor of its obligation to replace any of the plates mentioned in Article First of the contract that might develop defects. In making this second proposition the Secretary held that the *delivery* of armor was not to be regarded as its delivery under the contract and that the obligation of the original bond would not be fulfilled until the armor should have been *finally accepted* after it had remained on the ship for six months without developing defects. The Bethlehem Company furnished a third bond on May 8, 1912, but the Secretary did not cancel the original bond until May 15, 1912. At that time he did say that the third bond might be considered as having superceded the original bond from December 27, 1911, but he had retained the original bond, uncancelled, until May 15, 1912, and the claimant was obliged to and did pay for its renewal until the latter date. (*Finding V, pp. 23-24.*)

On May 15, 1912, the Secretary of the Navy appointed a board of naval officers for the purpose of determining the amount of increased or decreased compensation due the

claimant under the contract in suit. The board made its report, saying in substance that the claimant was entitled to extra compensation by reason of the Department's having retained the original bond, uncanceled after May 2, 1911, this being in addition to any requirement of the contract. (*Finding VI, 24-25.*) The Secretary disapproved this recommendation on July 18, 1912, saying (p. 20):

> "The original bond covered not only the initial delivery of the armor, but also the company's obligation to replace defective plates. The liability of the bond did not therefore cease, upon the *delivery* of the fast plate of the original armor, May 2, 1911, it continued thereafter and but for the acceptance of superseding bond would still subsist."

The cost of carrying the bond from May 3, 1911, to December 27, 1911, was $3,135.66, and the cost of carrying it from December 27, 1911, to May 15, 1912, was $2,373.96, making in all the sum of $5,509.62. (*Finding VII, p. 25.*)

On these facts, the Court held that the Secretary erred in saying that the contract required the claimant to keep the original bond in force *after the delivery* of the armor and until its *final acceptance*. It based this conclusion upon the terms of Article Fifteenth of the contract—the only one that referred to the giving of bond—wherein it was provided that the duration of the bond should be controlled by the *delivery* of the armor plates and not by their *final acceptance*. The only sense in which the term "*delivery*" was used anywhere in the contract or in the specifications was to describe the *delivery* of the original plates after they had been *provisionally accepted* by the Department. The Department might have framed Article Fifteenth of the contract in such way that the claimant would have been obliged to furnish

bond to secure the *final acceptance* of the armor, but the Department elected otherwise. The contract, having been drawn up by the Department, was not to be given an interpretation at variance with the language used simply because it would be favorable to the Department. Again, the court took occasion to call attention to Section 3 of Article Thirteenth (p. 11), which reads:

> "There shall be a reservation of 10 per cent from the price of each group of armor *delivered* under this contract, to be retained until the group shall have been completed: *Provided, That such reservation on the last group pertaining to the armor for any particular vessel shall be retained until all the armor furnished by the party of the first part (company) for such vessel has been in place for a period of six months in accordance with the requirements of the circular and specifications forming part of this contract.*"

From this it is clear that the withholding of the reservation was intended to be security for the replacement of plates that developed defects *after delivery* and it was not the purpose of the contract to extend the obligation of the bond beyond the *delivery* of the armor.

With respect to the company's right to recover the sum paid for the renewal of the original bond from May 2, 1911, when it should have been cancelled, until May 15, 1912, when it was cancelled, the court held that this was done voluntarily and the company could not recover. It said that before paying for the renewal, the company should have made demands and protests and should have awaited threats that the contracts would be canceled, or some other manifestations of the Secretary's authority and power, if it wished to hold the Department liable, pecuniarily.

It is submitted that this last was error.

Specification of Errors.

The errors of the Court of Claims relied upon and intended to be argued are these:

1. The said Court erred in denying to the claimant the right, set up in the petition, to recover the sum expended by it to carry the original bond from May 2, 1911, to May 15, 1912, or for any period subsequent to May 2, 1911.

2. The said Court erred in holding that payment by the claimant of the cost of carrying the original bond subsequent to May 2, 1911, was voluntary and not done under a requirement by the Secretary of the Navy or under a change of the terms of the contract ordered by him.

3. The said Court erred in failing and refusing to hold that the retention by the Department of the original bond, furnished by the claimant, after the claimant had completed the delivery of the armor plates specified by Article First, and the failure and refusal of the Secretary to cancel the bond until May 15, 1912, was not a change of the terms of the contract, on account of which the claimant became and was entitled to recover the additional cost found to have been caused by the change.

4. The said Court erred in failing and refusing to give judgment for the claimant in the sum of $5,509.62, expended by it for premiums that accrued and were paid to renew the bond after May 2, 1911, and until the cancellation thereof, in addition to the sum of $3,170.69, representing the amount admittedly retained and withheld by the United States from the price payable to the claimant for additional armor furnished in fulfillment of the Department's order of November 30, 1910.

Argument.

It is submitted that the facts found by the Court of Claims lead to a conclusion the direct opposite of the one reached by that court. How can it be said that the payment of premium for renewal of the bonds from May 2, 1911, until May 15, 1912, was voluntary on the part of the company, when the Department, having possession of the bond, refused to cancel it, or even advise the sureties that its obligation had been terminated? The company had procured the execution of the bond by its sureties, agreeing to pay premiums as long as the bond should remain uncancelled, on its obligation should continue in force. The failure of the Department to cancel the bond on May 2, 1911, operated, automatically, to require the company to pay premiums that accrued after that date. The company could not refuse to pay them without repudiating its bargain with the sureties. The Department knew that, or should have known it.

The Department made provisional acceptance of all armor, when ready for delivery and kept a record of all deliveries made by the contractor. On May 2, 1911, its record showed, and it knew, or should have known that no part of the armor specified in Article First, *remained undelivered*. The Department, having drawn up the contract, knew, or should have known, what it contained and what rights and obligations were created by it. It should have known that the bond furnished by the contractor, pursuant to the Article Fifteenth of the contract, had fulfilled the purpose for which it was given, and that it was incumbent upon the Department to cancel it.

The Secretary knew or should have known that the result of his retaining the bond uncancelled, after May 2, 1911, would be to impose upon the contractor a requirement in

addition to those that the contractor had assumed, or those contemplated by the Department when it drew up to the contract. He knew or should have known that if such additional requirement were made by him and the contractor assented to it, it could not be regarded otherwise than as a change in the terms of the contract, and specifications, made pursuant to the provisions of Article Seventh.

While under no obligation to do so, the company did, on November 16, 1911, request the official of the Department, having charge of such matters, to see to the cancellation of the bond. (*Finding V, p. 23.*) The finding shows that the Secretary refused to permit it to be cancelled. Again, on January 27, 1912, the company made formal request that the bond be cancelled, and again, the Secretary refused to cancel it. In both instances he knew, or should have known, that by his refusal he was impossing upon the contractor a requirement that the contract did not make and one that he could only make with the contractor's consent, as a change in the terms of the contract, reimbursing the contractor for the *actual cost caused by the change.*

It was not incumbent upon the contractor to engage in a controversy with the Secretary about the expediency or propriety of his conduct in retaining the bond and keeping it in force.

It is submitted that the view taken by the Board on Changes on May 17, 1912 (pp. 17-18), was correct and the only fair and proper view of the matter that could be taken.

JAMES H. HAYDEN,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

BETHLEHEM STEEL COMPANY, APPELLANT,
v.
THE UNITED STATES.

No. 191.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment in which appellant seeks to recover the sum of $5,509.62 over and above the sum of $3,170.62 admitted by the Government and allowed by the lower court.

Appellant entered into a contract with the Secretary of the Navy on September 27, 1909, to faithfully perform work embraced therein respecting the manufacture and delivery of armor plate (Rec. 7), and on September 28 executed a bond with the Empire State Surety Company of New York and the Fidelity & Deposit Company of Maryland, as sureties to "well and truly perform and fulfill its contract, * * * conforming in all respects to the stipulations, covenants, and conditions of said contract." * * *. (Rec. 23.)

On November 30, 1910, the department ordered armor plates for the fire-control tower of the battle-

ship *Arkansas*. (Finding III, Rec. 22.) It was agreed that the furnishing of this additional armor would be considered a change in the terms of the contract and specifications and would be dealt with in the manner provided by Article VII (Rec. 9). It was, however, subsequently agreed "that the additional armor required for the fire-control tower of the *Arkansas* should be treated as the last group under the original contract" * * * and "that to secure the replacement of any plates of the fire-control tower of the *Arkansas* that might prove defective the plaintiff should give a bond" * * *. (Finding V, Rec. 23, 24.) The premiums on the original bond were paid by appellant from September 28, 1909, to May 12, 1915. All of the original plates were delivered by May 2, 1911. Some of them were, however, defective. The contract provided (par. 75, Rec. 26) that those showing defects within six months after being fastened on the ship were to be replaced by the contractor without delay or cost to the shipbuilders. Defective plates had not been replaced on the battleships *Wyoming* and *Arkansas* by March 5, 1912. Some were discovered as late as March 26, 1912. The last was replaced November 22, 1912. (Finding III, Rec. 22.)

It was provided under article 15 (Rec. 12) that the original bond might be reduced at the end of each calendar year to correspond to the estimated cost of armor then undelivered under this contract. The Secretary did not cancel the bond or terminate the same on May 2, 1911, the day on which all armor plate specified in

article 1 of the contract was delivered, nor was a reduction requested by appellant until January 27, 1912. On May 15, 1912, the Secretary canceled the original bond of $195,000 as of date December 27, 1911, upon appellant furnishing a $30,000 bond to supersede the former, conditioned upon appellant's obligation to furnish replacing plates under the original contract. (Finding V, Rec. 24.)

Appellant's position is that the original bond for $195,000 should have been canceled on May 2, 1911, the date on which the last group of armor plate was provisionally delivered, under article fifteenth of the contract, as provisional delivery terminated its responsibility under the bond. It seeks to recover the cost of premiums in the sum of $5,509.62 that it paid to continue the bond after May 2, 1911.

The Government maintains that the contract required appellant to secure the United States by bond until the contract was completed; that it was not completed until all of the terms of the contract were satisfied, and in particular paragraph 75, requiring replacement of defective plates within six months after the original ones had been fastened on the ship, which was November 22, 1912; that therefore the Government was not responsible for premiums in the sum of $3,135.66 on said bond for $195,000 for the period from May 3, 1911, to December 27, 1911, nor for the further sum of $2,373.96 for premium on said bond for the period from December 27, 1911, to May 12, 1915, the date on which the contract for bond was canceled.

First. The contract required appellant to pay the premiums for the period from May 3, 1911, to May 12, 1915.

Second. If it should be held that appellant was only required by article 15 to pay the premiums on the bond until provisional delivery of the armor plate, on May 2, 1911, then any expense incurred in carrying the bond after that date was voluntary and not chargeable to the Government.

ARGUMENT.

FIRST.

The contract required appellant to pay the premiums for the period from May 3, 1911, to May 12, 1915.

Appellant seeks to recover the sum of $5,509.62, the cost of premiums on the bond for the period from May 3, 1911, to May 12, 1915, on the theory that the Secretary of the Navy should, on his own initiative, have canceled the bond on May 2, 1911, the date when the last group of armor was delivered and provisionally accepted. Such a reading of the contract does not give full effect to all of its language. Article 15 (Rec. 12) required appellant to "give a bond, with satisfactory sureties, for the faithful performance of the work embraced in this contract." The words "work embraced in this contract" comprehend all work, including the replacing of faulty plates, as prescribed in section 75 (Rec. 26), as follows:

> 75. Plates that develop defects after delivery sufficient to cause rejection, or that show cracks, due to faulty manufacture,

within six months after being fastened on the ship, must be replaced by the contractor without delay, and the actual cost and the damage, if any, to the shipbuilders due to the installation and removal of such defective plates must be paid by the contractors.

Giving full significance to all the terms of the contract, it would seem beyond dispute that until the replacement of defective plates had been completed the terms of the contract were not satisfied, and therefore the bond should have secured the Government until the defective plates were replaced.

Moreover, the actions of appellant under the contract would indicate that the foregoing was its understanding of the term "faithful performance of the work embraced in this contract." The lower court concedes in its opinion (Rec. 28) that both parties seem to have construed the original bond as securing the entire performance of the contract until January 27, 1912, when appellant asked for its cancellation. Appellant executed a bond the day after the contract was signed, the condition of which was that it should "well and truly perform and fulfill its contract" (Finding IV, Rec. 23). Had appellant thought that the bond only covered the period of provisional delivery it would have requested that the bond be reduced on May 2, 1911, or soon thereafter, being the date upon which the original delivery under article 1 was provisionally accepted. On the contrary, however, claimant made no request until January 27, 1912. (Finding V, Rec. 23.)

Again, when it became necessary for the department to have security for the replacing of armor plate furnished for the fire-control tower of the *Arkansas*, under paragraph 75 of the specifications covering defective plates, appellant promptly furnished a bond for $3,500 (Rec. 24), thus again indicating its own practical interpretation of the obligation imposed by article 15 of the contract.

It should be kept in mind that the continuance of the original bond beyond May 2, 1911, had nothing to do with the ordering of armor for the fire-control tower. The original bond for $195,000 was required, furnished, and held independently of the change in the contract whereby additional armor was ordered. This is evidenced by the defendant's request and appellant's furnishing of the $3,500 bond to secure the replacement of defective armor plates ordered for the fire-control tower.

If, as the Government maintains, the language of article 1 of the contract read together with the other terms covered the replacement of defective plates, then the contract was not fulfilled until the replacement was completed. Such being the fact appellant can not recover for the expense of carrying the bond after May 2, 1911.

Were it not that the Court of Claims, in arriving at the same conclusion as the Government, puts a different construction on some of the language of the contract already discussed, this brief would end here. Out of consideration for its views, however,

the Government discusses the variance under the next heading.

SECOND.

If it should be held that appellant was only required by article 15 to pay the premiums on the bond until provisional delivery of the armor plate on May 2, 1911, then any expense incurred in carrying the bond after that date was voluntary and not chargeable to the Government.

The court, in its opinion, while reaching the same conclusion, differs with the Government in its construction of some of the language of the contract. It says (Rec. 26):

> We are constrained to agree with the plaintiff that the bond required by Article XV, above quoted, was only for the provisional delivery of the armor plate as required by the contract, and had no reference to the replacement of such armor plate as might prove defective. We come to this conclusion (1) from the fact that the word "delivery" as used in all other parts of the contract has reference only to such conditional delivery; (2) the language of section 3 of Article XIII of the contract indicates to our minds that the reservation of 10 per cent from the price of each group as delivered was intended to secure the defendants from damages on account of defective armor plates.

This seems too restricted a reading of the contract and does not give meaning to all of its terms. The lower court and appellant must admit that the replacement of defective plates under

section 75 was as much a part of appellant's contractual obligations as furnishing them in the first instance. The court, however, says that effect must be given to section 3 (Rec. 27), providing that "there shall be a reservation of 10 per cent from the price of each group of armor delivered under this contract, to be retained until the groups shall have been completed," and argues that—

> Any other construction of said Article XV would render the provision for the reduction of the bond absolutely nugatory, for if we construe it to be reduced only after the full performance of the contract by the plaintiff—i. e., not until after all defective plates had been delivered and accepted there would—be no benefit accruing to the plaintiff, because it would then be canceled by operation of law and there could have been no intermediate reduction.

It will be noted, however, that the percentage retained was 10 per cent of the purchase price of each group of armor until and not after the group was fully completed. It was the percentage of the *last* group *only* that was retained after delivery of that group was completed (par. 3, Rec. 11). But even this reservation could not be retained indefinitely, and in this respect appellant and the lower court's contention completely ignore the last paragraph of clause 3, Article XIII (R. 11) of the contract, which provides for the payment of the 10 per cent reserved at the expiration of nine months from shipment of last plate of last group of armor

from appellant's works, if not placed on the ship within that period.

This reservation on all groups but the last was paid when appellant submitted the $3,500 bond to cover replacement of defective plates for the fire-control tower of the *Arkansas*. The 10 per cent reserved on the last group only was to be retained until all armor had been in place for six months, provided, however, that it should not be retained beyond nine months from the date of shipment of last armor from appellant's works, though not erected on ship. The record shows that the last group of armor under Article I was shipped from claimant's works May 2, while the last plate of that group was fitted in place on December 15, 1911; and that the last replacement of defective plate was November 22, 1912. (Finding III, Rec. 22.)

Accepting the lower court's view, for the purposes of the argument only, suppose the 10 per cent had been paid, say, after each one of four deliveries and the time had elapsed for retaining the 10 per cent on the fifth or last delivery, as required by section 3 (Rec. 11), and the same had been paid; that subsequently defective plates had been discovered on the third and fourth deliveries, and this after May 2, 1911, what protection would the Government have had for the replacement of defective plates if the bond for $195,000 had been canceled and no substitute been offered.

Had it been possible for all the armor plate to have been perfect and so demonstrated as each group was placed on the ships, then the Government might have reduced the bond with safety. In view, however, of the fact that defective plates were found, the Secretary used the discretion accorded him by the use of the word "may" in article 15 and continued the life of the bond until all defective plates were replaced. The language of that article is not mandatory but discretionary. The Secretary interpreted the word "undelivered" as applying to defective as well as to original plates.

This gave effect to all of the contract and was necessary, in view of the fact that the 10 per cent reservation was not adequate protection to the Government for all of the armor plate provisionally accepted during the entire life of the contract and until the defective plates were replaced. Therefore, while the Government differs with the lower court in its interpretation of this part of the contract, nevertheless if this court should find that appellant did not have to carry the expense of the bond beyond May 2, 1911, it is submitted that the cost of carrying it beyond that date was a voluntary matter on the part of appellant, as revealed by the record herein. Hence, the Government should not be required to reimburse appellant for the premiums.

HUSTON THOMPSON,
Assistant Attorney General.

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BETHLEHEM STEEL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 191. Argued March 15, 1918.—Decided April 15, 1918.

Having given bond to secure a contract with the Navy Department, claimant paid premiums after alleged compliance with the condition, and sued to recover the amount, contending that the Secretary of the Navy should have canceled the bond and notified the surety. It not appearing that claimant had bound itself to continue paying premiums until the Secretary so acted, *held*, that the payment was voluntary and gave no cause of action in the Court of Claims.
51 Ct. Clms. 394, affirmed.

THE case is stated in the opinion.

Mr. James H. Hayden for appellant.

Mr. Assistant Attorney General Thompson for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Bethlehem Steel Company entered into a contract, dated September 27, 1909, with the United States to manufacture and deliver for the Navy large quantities of several groups of armor plates, and agreed to replace any accepted

armor which should prove defective within six months after it had been fastened on the ship. The contract required the company to furnish a bond with sureties in a sum equal to ten per cent. of the total cost of all groups, and provided that "at the end of each calendar year the amount of said bond may be reduced to correspond to the estimated cost of armor then undelivered." The bond was furnished; and delivery of all the armor originally specified was completed May 2, 1911. But on March 26, 1912, plates aggregating at cost prices more than the penalty of the bond were found to be defective, and a part of this was not replaced until November 22, 1912. On January 27, 1912, the company formally requested the Secretary of the Navy to cancel the bond and notify the surety, but he refused to do so except upon certain conditions which were not complied with until May 15, 1912, when the bond was canceled. The company had expended $5,509.62 in payment of premiums on the bond from May 3, 1911, until May 15, 1912, and demanded reimbursement by the Government. Payment being refused, suit was brought in the Court of Claims to recover this amount and also a balance of $3,170.69 for plate delivered. Judgment for the latter sum was entered; but the court held that the company was not entitled to recover for the premiums paid. The case comes here under § 242 of the Judicial Code.

The lower court held that the bond covered merely the original delivery of the armor plate and not the replacement of defective plates; but it refused recovery of the amount paid for premiums after May 3, 1911, on the ground that the payment thereof was voluntary, because the condition of the bond had then been complied with. The Government contends that the bond covered the replacement also; that the contract made reduction of the bond permissive, not mandatory; and that the Secretary was, in any event, under no obligation to cancel the

bond prior to the request made January 27, 1912. We have no occasion to consider any of these contentions. It nowhere appears that the company had bound itself to continue to pay premiums until the Secretary canceled the bond and gave the surety notice thereof. So far as disclosed by the record, the payment of premiums was voluntary. The judgment of the Court of Claims is

Affirmed.

MR. JUSTICE MCKENNA dissents.